



# CLACKAMAS COUNTY

Department of Transportation & Development

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THOMAS J. VANDERZANDEN  
DIRECTOR

October 28, 1997

Office of the Secretary  
Federal Communications Commission  
Washington, DC 20554

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Re: Rule making (Docket No. 97-182); request by the National Association of Broadcasters and the Association for Maximum Service Television for a preemption of local zoning authority over television and radio broadcast towers.

Members of the Federal Communications Commission,

The purpose of this letter is to provide comments regarding the above referenced rule making proposal. Clackamas County is a political jurisdiction of the State of Oregon. We are located just south of the City of Portland, Oregon, with a small portion of the city being located within our boundaries. Clackamas County has a population of approximately 323,000. The best information available to us is that the Portland metropolitan area market ranks #26 nationally.

As a local jurisdiction with regulatory authority over land use/zoning, the Clackamas County Planning Department has concerns regarding any proposal to preempt local regulations. While we do not question the FCC's authority to preempt, we do believe any such action should be taken only if a clearly documented "obstacle" exists in the local land use process. We do not believe it is appropriate to adopt a preemption simply for the convenience of the joint petitioners. The burden should be on the petitioners to specifically identify what state or local regulations would unreasonably prohibit or delay digital television (DTV) service from being established within previously adopted FCC deadlines.

In Section IV, "Request for Comments", of MM Docket No. 97-182, the Commission asks for comments on several issues, including the Petitioner's proposal. We will spend the balance of this letter providing comments in those areas requested, beginning with the Petitioner's proposal. As we read the Petitioner's proposal, it can be narrowed down to four specific areas; time limitations for local government review, factors which local governments cannot consider in their review, timing for written decisions to be provided to applicant's, and "appeal" process. We believe the time limitations proposed by the Petitioners are unrealistic. Given the deadlines imposed by the FCC, we understand the need for an expeditious review of DTV facilities. However, it appears the Petitioner's proposal is using these deadlines to propose arbitrary time limitations and create an unfounded sense of urgency. Over the last three years the Clackamas County Hearings Officer has reviewed approximately 80 applications for cellular telephone tower/poles and associated facilities. Many of these applications were reviewed under the restrictions of the 1996 Telecommunications Act. A majority of these applications were reviewed, to include a public hearing and oral decision, within 45-60 days of the date the applications were submitted. Oral decisions were followed by written findings by approximately 21 days. Thus, our processing time was approximately 66-81 days. We would expect DTV facilities to require comparable times for review. While this is somewhat longer than proposed by the Petitioner's, we do not feel this is extensive to the extent it causes a major obstacle to the timely siting of DTV facilities, especially if applicants file their

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applications in a timely manner. We believe that a processing time of 120 day for a final decision is appropriate. This is the statutory requirement for processing land use applications in Oregon. Most jurisdictions have designed their review process to comply with the 120 day requirement (in the alternative, the 90 day period identified under your item 23 would be acceptable, albeit not necessarily desirable).

The Petitioner's have also identified several factors that local governments cannot consider as a basis for denial of DTV facility applications. We cannot consider environmental or health effects of radio frequency emissions, or interference effect on existing or potential telecommunications providers, end users, broadcasters or third parties if the facility has been determined by the FCC to comply with applicable FCC regulations and/or policies concerning emissions and interference. We also cannot consider lighting, painting and marking requirements if the facilities have been found to be in compliance with FCC and Federal Aviation Administration requirements for lighting, painting and marking. We have no problem with this type of preemption as long as applicants provide information verifying their facilities are in compliance with applicable FCC and FAA requirements. These are areas which we do not have the expertise to review. However, if applicants do not provide persuasive evidence that the facilities meet FCC and FAA requirements, we should have the ability to consider those factor in our decision making process.

Section 'c' of the Petitioner's proposal would require local jurisdictions to provide written findings, supported by substantial evidence in the record, on all decisions related to DTV facilities. These written finding must be delivered to all applicants within five days of the written decision. This does not appear to be unreasonable.

Sections 'd' and 'e' identify standards for alternative dispute resolution and declaratory relief, respectively. While we would prefer to see any "appeals" handled under the processes established by local jurisdictions, we understand how these processes could effectively drag on long enough to prevent and applicant from meeting their FCC mandated deadlines. We have three major concerns regarding the Petitioner's proposal; timing for filing a notice of election for alternative dispute resolution, lack of appeal rights for those parties opposed to the DTV facility and location of arbitrator. We believe it would be appropriate that a filing for alternative dispute resolution be made within 30 days of the date of the local written decision, not within 10 days of the applicants receipt of that decision. This would establish a specific time period that would not fluctuate based on mail delivery or office mail handling procedures. It would also be consistent with the time lines for filing a request for declaratory relief.

We very strongly object to the applicant being the only party with any rights to relief from the decision of the local decision maker. Whatever rights are available to an applicant must also be available to any other party of the proceeding. If the "appeal" process is to be handled by the FCC, we would suggest that dispute resolution be available to all parties.

If the FCC accepts the Petitioner's proposal for alternative dispute resolution and declaratory relief, they should also consider establishing at least regional review locations. Particularly in the case of alternative dispute resolution, travel to FCC offices in Washington DC would be a tremendous financial hardship on local jurisdictions.

Under item 19 you request input for a number of sources, including local government officials, on the nature and scope of broadcast tower siting issues. To an extent, we would expect the issues to include the same basic issues we ran into in reviewing PCS cellular sites, but somewhat magnified due to the additional height of the DTV facilities. These issues generally included, unsightliness, emissions, noise,

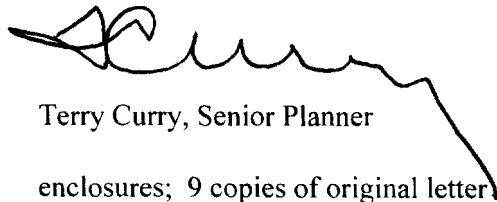
impact on property values and location in residential areas. Obviously, we were not permitted to address emissions. Unsightliness and noise were handled through conditions of approval requiring vegetative screening of the equipment shelter (not too much could be done regarding the visual impact of the towers/poles themselves). Our hearings officer specifically found impacts on property values were not an approval criterion. One local requirement that would very well be an issue with DTV facilities is our requirement that television and radio broadcast and receiving towers be located a distance equal to their height from all property lines. We understand the DTV towers will in some cases be up to one-half mile in height. Given this restriction, it would be very difficult to find appropriate sites. While this local jurisdiction will not consider amending its ordinance to accommodate any specific party, a requirement from the FCC requiring all DTV facilities to be located a maximum distance from all property lines may be a workable alternative.

Under item 21 you ask for comments regarding the scope of any preemption which might occur. If a preemption is approved by the FCC, that preemption should apply only to those facilities that are subject to the deadlines established in your Fifth Report and Order. Since Portland is the 26th rated market, DTV facilities must be on the air with digital signals by November 1, 1999, under the Fifth Report and Order. Since other broadcast facilities are not subject to these deadlines, we believe that only DTV facilities should be covered by any preemption. We have no comment on limiting the preemption to only the top markets where the roll-out schedule is more aggressive.

Under item 22 you ask if the preemption should include local regulations intended for aesthetic purposes. We do not believe regulations for aesthetic purposes should be preempted. As I have mentioned earlier, we use aesthetic screening of low ground mounted facilities to minimize the visual impact of this type of facility. Again, not much can be done about the visual impact of the tower. We believe that requirements such as screening sometimes offer an adjacent property owner their only level of relief from the impacts generated by these facilities.

We appreciate the opportunity to respond to the Petitioner's proposal. While we understand the need to have DTV facilities on the air in a timely manner, we strongly urge you not to preempt local processing times that are established by law or ordinance. We would also urge that you allow local appeal procedures to prevail, at least to an extent. If possible, please provide us with the results of this preemption proposal and a copy of any adopted rule providing for preemption.

Cordially,



Terry Curry, Senior Planner

enclosures; 9 copies of original letter

- c. Clackamas County Board of Commissioners
- Mike Judd, County Counsel
- Doug McClain, Planning Director
- B.J. Smith, Clackamas County Government Affairs

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